

DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF PROCEDURE OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

REQUEST FOR COMMENT

Comments are sought on Amendments to:

United States Foreign Intelligence
Surveillance Court of Review
Rules of Procedure

All Written Comments are Due by
February 1, 2016



Prepared by the
United States Foreign Intelligence Surveillance Court of Review
Washington, D.C.

December 2015

**UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW
Washington, D.C.**

Notice of Proposed Rules of Procedure

With the passage of the USA Freedom Act, 50 U.S.C. §§ 1801-1885 (2015), the Foreign Intelligence Surveillance Court of Review (“FISCR”) is replacing and updating its 1980 Rules of Procedure. By posting a draft of these proposed rules, the court is providing the public with notice and the opportunity to submit comments as to these procedures regulating practice before the FISCR. Any comments concerning the proposed rules should be sent to response@ao.uscourts.gov. The comment period will close on February 1, 2016, after which the FISCR will consider any comments received, make revisions as it deems appropriate, and then transmit the final Rules of Procedure as directed by 50 U.S.C. § 1803(g).

1 UNITED STATES
2 FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW
3 Washington, D.C.
4

5 RULES OF PROCEDURE

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PROPOSED

1 **Title I. Applicability of Rules.**
2

3 **Rule 1. Scope of Rules.**

4 **(a) Scope.** These rules govern procedure in the United States Foreign
5 Intelligence Surveillance Court of Review (“FISCR”).

6 **(b) Definitions.**

7 **(1)** The “Act” refers to The Foreign Intelligence Surveillance Act of 1978
8 (“FISA”) and its subsequent amendments.

9 **(2)** The “Court” refers to the Foreign Intelligence Surveillance Court of
10 Review.

11 **(3)** The “Clerk” refers to the Clerk of the Court for the FISCR and the
12 Foreign Intelligence Surveillance Court (“FISC”).

13 **(c) Amendment.** Any amendment to these rules must be promulgated in
14 accordance with 50 U.S.C. § 1803(g).

1 **Rule 2. Suspension of Rules.**

2 On its own or a party's motion, the Court may—to expedite its decision or for
3 other good cause—suspend any provision of these rules in a particular case and
4 order proceedings as it directs.

PROPOSED

1 **Title II. National Security Information.**
2

3 **Rule 3. National Security Information.** In all matters, the Court, its staff, and
4 anyone appearing before it must comply with the security measures in 50 U.S.C.
5 §§ 1803(c), 1822(e), 1861(f)(4), and 1881a(k)(1), as well as Executive Order
6 13526, “Classified National Security Information,” or its successor. Members of
7 the Court’s staff must possess a security clearance at a level commensurate with
8 their responsibilities.

PROPOSED

1 **Title III. Structure and Powers of the Court.**
2

3 **Rule 4. Authority of the Judges and Structure.**

4 **(a) Scope of Authority.** The FISCR is an appellate court established by act
5 of Congress. The judges of the Court may exercise the authority granted
6 by the Act and such other authority as is consistent with Article III of the
7 Constitution and other statutes and laws of the United States.

8 **(b) Quorum.** A majority of the number of judges authorized to constitute
9 the Court constitutes a quorum. Procedural motions may be accepted and
10 acted on by any judge of the Court.

1 **Title IV. Matters Presented to the Court.**

2
3 **Rule 5. Means of Requesting Relief from the Court.**

4 **(a) Notice of Appeal.**

5 **(1) Whether a Notice of Appeal Must be Filed.** A notice of appeal shall
6 constitute the motion referred to in 50 U.S.C. §§ 1803(a)(1) and
7 1822(c); or the petition referred to in 50 U.S.C. §§ 1861(f)(3),
8 1881a(h)(6)(A) and (i)(4)(A), 1881b(f)(1), and 1881c(e)(1).

9 **(2) Filing the Notice of Appeal.** An appeal referred to in subpart (1)
10 may be taken only by filing a notice of appeal with the Clerk within
11 30 days after the challenged order is entered.

12 **(3) Contents of the Notice of Appeal.** The notice of appeal must:

13 **(A)** name the party taking the appeal in the caption of the notice;
14 and

15 **(B)** designate the order or part thereof being appealed.

16 **(4) Serving the Notice of Appeal.** Upon receipt of a notice of appeal,
17 the Clerk must serve notice of its filing on each party's counsel of
18 record, excluding the appellant's. The Clerk must note on the docket
19 the names of the parties to whom the Clerk provided copies, with the
20 date and manner of service. If an amicus curiae is appointed by the
21 Court, the Clerk must similarly serve them with a filed notice of
22 appeal within one day of appointment.

23 **(b) Certification for Review.** Where the FISC certifies for review a question of
24 law under 50 U.S.C. § 1803(j), the FISC will certify, by appropriate order,
25 the procedures to be followed.

1 **Rule 6. Stay Pending Appeal.**

2 **(a) Initial Motion in the FISC.** A party must ordinarily first move in the FISC
3 for the following relief:

4 (1) a stay of a FISC order pending appeal; or

5 (2) an order suspending, modifying, restoring, or granting an injunction
6 while an appeal is pending.

7 **(b) Motion in the Court of Appeals.** A motion for relief described in Rule 6(a)
8 may be made to the FISCR.

9 (1) The motion must:

10 (A) show that moving in the FISC would be impracticable; or

11 (B) state that, a motion having been made, the FISC denied the
12 motion or failed to afford the relief requested and state any
13 reason given by the FISC for its action.

14 (2) The motion must also include:

15 (A) the reasons for granting the relief requested and facts relied on;

16 (B) originals or copies of affidavits or other sworn statements
17 supporting facts subject to dispute; and

18 (C) relevant parts of the record.

19 (3) A motion under Rule 6(b) must be filed with the Clerk and normally
20 will be considered by all members of the FISCR. But in an
21 exceptional case in which time requirements make that procedure
22 impracticable, the motion may be made to and considered by a single
23 FISCR judge.

1 **Rule 7. The Record on Appeal.**

2 **(a) Composition of the Record on Appeal.** The following items constitute the
3 record on appeal:

- 4 (1) the original papers and exhibits filed in the FISC;
5 (2) the transcript of proceedings, if any; and
6 (3) a certified copy of the docket entries prepared by the Clerk.

7 **(b) Correction or Modification of the Record.**

8 (1) If any difference arises about whether the record truly discloses what
9 occurred in the FISC, the difference must be submitted to and settled
10 by the FISC judge who presided over the issue in dispute, and the
11 record conformed accordingly.

12 (2) If anything material to either party is omitted from or misstated in the
13 record, whether by error or accident, the omission or misstatement
14 may be corrected and a supplemental record may be certified and
15 forwarded:

- 16 (A) on stipulation of the parties;
17 (B) by the FISC before or after the record has been forwarded; or
18 (C) by the FISC.

19 (3) All other questions as to the form and content of the record must be
20 presented to the FISC.

1 **Rule 8. Extraordinary Writs.** All writs that may be issued by United States
2 courts of appeals shall be available to the FISCR.

PROPOSED

1 **Rule 9. Filing.**

2 (a) **Filing with the Clerk.** A paper required or permitted to be filed in this
3 Court must be filed with the Clerk.

4 (b) **Filing: Method and Timeliness.**

5 (1) **Filing.** A submission is filed by delivering it to the Clerk or as
6 otherwise directed by the Clerk under Rule 9(b)(5).

7 (2) **Electronic Filing.** The Clerk may accept and file submissions by any
8 reliable and appropriately secure electronic means approved in
9 advance by the Clerk.

10 (3) **Facsimile or Scanned Signature.** The Clerk may accept for filing a
11 submission bearing a facsimile or scanned signature in lieu of the
12 original signature. On acceptance, a submission bearing a facsimile or
13 scanned signature is the original Court record.

14 (4) **Copies.** Except as otherwise provided, a signed original and three
15 copies must be filed with the Clerk.

16 (5) **Instructions for Delivery to the Court.** A party may obtain
17 instructions for delivering submissions permitted under the Act and
18 these rules by contacting the Clerk at (202) 357-6250.

19 (c) **Form.** Unless otherwise ordered, all submissions must follow the format
20 below:

21 (1) on 8 ½ x 11 inch, opaque white paper;

22 (2) typed double-spaced or reproduced in a manner that produces a clear
23 black image, but quotations more than two lines long may be indented
24 and single-spaced;

25 (3) margins of at least one inch on all four sides; and

26 (4) page numbered in the lower margin of the page.

27 (d) **Contact Information.**

28 (1) **A Party Other Than the Government.** In an initial filing with the
29 Court, a party other than the government must include full name,
30 address, telephone number, and email address, but if a party is
31 represented it must include counsel's full name, address, telephone
32 number, facsimile number, email address, and bar membership
33 information—in addition to the party's full name.

34 (2) **Filing by the Government.** In an initial filing with the Court, the
35 government must include the full name of the attorney representing
36 the United States, a mailing address, telephone number, facsimile
37 number, and email address.

38 (e) **Information Concerning Security Clearances.** A party other than the
39 government must:

- 1 (1) State in the initial submission whether the party – or the party’s
2 responsible officers or employees – and counsel for the party hold a
3 security clearance;
4 (2) Identify the federal agency granting the clearance, a point of contact
5 and contact information for the federal agency, and the classification
6 level of the clearance.
7 (f) **Signature.** Every submission filed with the Court must be signed by the
8 party filing the submission, or if the party is represented, by one of the
9 party’s attorneys.

PROPOSED

1 **Rule 10. Service.**

2 **(a) By a Party Other Than the Government.** A party other than the
3 government must, at or before the time of filing a submission permitted
4 under the Act and these rules, serve a copy on the government. Instructions
5 for effecting service must be obtained by contacting the Litigation Security
6 Group, United States Department of Justice, by telephone at (202) 514-9016.

7 **(b) By the Government.** At or before the time of filing a submission in an
8 adversarial proceeding, the government must serve a copy by hand delivery
9 or by overnight delivery on counsel for the other party, or, if the party is not
10 represented by counsel, on the party directly. Except as otherwise ordered, if
11 the government files ex parte a submission that contains classified
12 information, the government must file and serve on the non-governmental
13 party an unclassified or redacted version. The unclassified or redacted
14 version, at a minimum, must clearly articulate the government's legal
15 argument.

16 **(c) Certificate of Service.** A party must include a certificate of service
17 specifying the time and manner of service.

1 **Rule 11. Computation of Time.** Time periods specified by these rules or by
2 order of this Court must be computed as follows:

3 (a) **Day of the Event Excluded.** Exclude the day of the event that triggers the
4 period.

5 (b) **Compute Time Using Calendar Days.** Compute time using calendar days,
6 not business days.

7 (c) **Include the Last Day.** Include the last day of the period; but if the last day
8 is a Saturday, Sunday, or legal holiday, the period continues to run until the
9 next day that is not a Saturday, Sunday, or legal holiday.

10 (d) **Extending Time.** For good cause, the Court may extend the time prescribed
11 by these rules or by its order to perform any act, or may permit an act to be
12 done after that time expires.

1 **Rule 12. Corporate Disclosure Statements.**

2 (a) **Who Must File.** Any nongovernmental corporate party to a proceeding in
3 the Court must file a statement that identifies any parent corporation and any
4 publicly held corporation that owns 10% or more of its stock or states that
5 there is no such corporation. Such statement must also identify whether any
6 parent corporation, or any person or corporation owning 10% or more of the
7 corporation is under foreign ownership, control, or influence, as defined in
8 Intelligence Community Standard 700-01.

9 (b) **Time for Filing; Supplemental Filing.** A party must file the Rule 12(a)
10 statement with the principal brief or when filing a motion, response, petition,
11 or answer in the Court, whichever occurs first. Even if the statement has
12 been previously filed, it must be included in the party's principal brief before
13 the table of contents. A party must supplement its statement whenever the
14 information that must be disclosed under Rule 12(a) changes.

1 **Rule 13. Motions.** A party seeking specific relief from the Court may do so by
2 motion, which must conform to the requirements of Rule 9(c).

PROPOSED

1 **Rule 14. Briefs.**

2 **(a) Appellant's Brief.** The appellant's brief must contain, under appropriate
3 headings and in the order indicated:

- 4 (1) a corporate disclosure statement, if required by Rule 12;
5 (2) a table of contents, with page references;
6 (3) a table of authorities—cases (alphabetically arranged), statutes, and
7 other authorities—with references to the pages of the brief where they
8 are cited;
9 (4) a jurisdictional statement;
10 (5) a statement of the issues presented for review;
11 (6) a concise statement of the case setting out the facts relevant to the
12 issues submitted for review, describing the relevant procedural
13 history, and identifying the rulings presented for review, with
14 appropriate references to the record (see Rule 14(f));
15 (7) a summary of the argument, which must contain a succinct, clear, and
16 accurate statement of the arguments made in the body of the brief, and
17 which must not merely repeat the argument headings;
18 (8) the argument, which must contain:
19 (A) appellant's contentions and the reasons for them, with citation to
20 the authorities and parts of the record on which the appellant
21 relies; and
22 (B) for each issue, a concise statement of the applicable standard of
23 review (which may appear in the discussion of the issue or under a
24 separate heading placed before the discussion of the issues);
25 (9) a short conclusion stating the precise relief sought; and
26 (10) the certificate of compliance.

27 **(b) Appellee's Brief.** The appellee's brief must conform to the requirements of
28 Rule 14(a) (1)–(8) and (10), except that none of the following need appear
29 unless the appellee is dissatisfied with the appellant's statement:

- 30 (1) the jurisdictional statement;
31 (2) the statement of the issues;
32 (3) the statement of the case; and
33 (4) the statement of the standard of review.

34 **(c) Reply Brief.** The appellant may file a brief in reply to the appellee's brief.
35 Unless the Court permits, no further briefs may be filed. A reply brief must
36 contain a table of contents (with page references) and a table of authorities—
37 cases alphabetically arranged, statutes, and other authorities—with
38 references to the pages of the reply brief where they are cited.

39 **(d) Format.** Briefs filed with the Court must conform to Federal Rule of
40 Appellate Procedure 32(a).

1 (e) **References to Parties.** In briefs and at oral argument, counsel should
2 minimize use of the terms “appellant” and “appellee.” To make briefs clear,
3 counsel should use the designation used in the FISC, or a descriptive term,
4 such as “the service provider,” “the telephone company,” or “the
5 government.”

6 (f) **Appendix to the Briefs.**

7 (1) **Contents of the Appendix.** The appellant must prepare and file an
8 appendix to the briefs containing:

9 (A) the relevant docket entries in the proceeding below;

10 (B) the relevant portions of the pleadings, findings, or opinion;

11 (C) the judgment, order, or decision in question; and

12 (D) other parts of the record to which the parties wish to direct the
13 Court’s attention.

14 (2) **Determining the Contents of the Appendix.** The parties are
15 encouraged to agree on the contents of the appendix. In the absence
16 of an agreement, the appellee may file a separate appendix but the
17 appellee’s supplemental appendix must not duplicate any material
18 contained within appellant’s appendix.

19 (3) **Format.** Any appendix filed with the Court must meet the
20 requirements of Rule 9(c) and Federal Rule of Appellate Procedure
21 32(b), in addition to the following:

22 (A) the appendix must begin with a table of contents identifying the
23 page at which each part begins;

24 (B) the appendix must be organized chronologically, beginning with
25 the most recent information;

26 (C) the pages of the appendix must be numbered sequentially with the
27 appellant’s pages beginning with “App. 1,” and continuing;

28 (D) the appellee’s supplemental appendix, if necessary, will be
29 numbered sequentially beginning with “S. App. 1,” and
30 continuing; and

31 (E) when pages of a transcript are included in an appendix, the
32 original pagination of the transcript must be legible.

33 (4) **References to the Record.** References to the parts of the record
34 contained in the appendix filed with the appellant’s brief must be to
35 the pages of the appendix. Parties’ briefs may refer only to parts of
36 the record that are reproduced in the appendix.

37 (5) **Ex parte Appeals.** If an appeal is taken ex parte by the government,
38 then the government must comply with these rules as they apply to the
39 appellant.

1 **Rule 15. Amicus Curiae.**

2 **(a) Whether to Appoint an Amicus Curiae.**

3 **(1) Request of the Parties.** Parties to a matter may request that the Court
4 appoint an amicus curiae to participate in that particular matter. But
5 any such request is not binding on the Court.

6 **(2) Amicus Curiae Appointed in the FISC.**

7 **(A)** The FISCR is not bound by the FISC's decision to appoint an
8 amicus curiae and will make its own independent decision
9 whether to do so.

10 **(B)** If the FISC has previously determined that a matter involves a
11 novel or significant interpretation of the law, the FISCR will
12 appoint an amicus curiae unless it issues a finding that such
13 appointment is not appropriate.

14 **(3) Requests to Participate as an Amicus Curiae.** An individual or
15 organization may request to participate as an amicus curiae in any
16 matter, whether or not such individual or organization has been
17 previously designated under 50 U.S.C. § 1803(i)(1). Such request
18 must be made by motion, consistently with these rules. But any such
19 request is not binding on the Court.

20 **(4) Appointment by the Court.** The Court – when necessary – may
21 appoint one or more individuals as amicus curiae. Such appointment,
22 if the Court deems it appropriate, will be made in accordance with 50
23 U.S.C. § 1803(i)(2)(A) or (B) and will be made within a reasonable
24 time after the filing of the notice of appeal. The Court may appoint
25 amici for any purpose it deems appropriate, including the provision of
26 legal advice and technical expertise.

27 **(b) Assistance.** Once appointed, an amicus curiae may petition the Court to
28 designate additional amici to assist in preparing arguments subject to the
29 following limitations:

30 **(1)** the additional amici must meet the qualifications identified under 50
31 U.S.C. § 1803(i)(3);

32 **(2)** the parties will have 7 days to file a motion opposing the amicus
33 curiae's petition for additional amici; and

34 **(3)** the Court must approve the appointment of any additional amici.

35 **(c) Conflicts of Interest.** Upon designation, amicus curiae appointed under 50
36 U.S.C. § 1803(i)(1) must file a conflicts-of-interest form with the Court and
37 must update that form whenever changes occur but not less than once per
38 calendar year. If the Court appoints an individual as amicus curiae who has
39 not been designated under 50 U.S.C. § 1803(i)(1), that individual must also

1 submit a conflicts-of-interest form. The Clerk will provide such forms on
2 request.

3 **(d) Brief of an Amicus Curiae.**

4 **(1) Content.** An amicus curiae brief must conform to the requirements of
5 Rule 14(a)(2)-(8) and (10), except that none of the following need
6 appear:

7 (A) the jurisdictional statement;

8 (B) the statement of the issues; and

9 (C) the statement of the standard of review.

10 **(2) Format and Length.** An amicus curiae brief must meet the
11 requirements of Rule 9(c) and Federal Rules of Appellate Procedure
12 29(d) and 32(a).

13 **(e) Oral Argument.** The Court will determine whether it deems oral argument
14 necessary and whether the amicus curiae will be granted time for argument.

1 **Rule 16. Serving and Filing Briefs.**

2 (a) **Time to Serve and File a Brief.** The appellant must serve and file a brief
3 within 28 days after the notice of appeal is filed. The appellee must serve
4 and file a brief within 28 days after the appellant's brief is served. An
5 amicus curiae, if appointed, must serve and file a brief within 28 days after
6 appellant's brief is served. The appellant may serve and file a reply brief
7 within 14 days after service of the appellee's brief.

8 (b) **Number of Copies.** Four copies of each brief must be filed with the Clerk
9 and two copies must be served on counsel for each separately represented
10 party.

11 (c) **Consequence of Failure to File.** If an appellant fails to file a brief within
12 the time provided by this rule, or within an extended time, an appellee may
13 move to dismiss the appeal. An appellee who fails to file a brief will not be
14 heard at oral argument.

1 **Title V. Oral Argument, Entry of Judgment.**
2

3 **Rule 17. Oral Argument.**

4 **(a) In General.** The Court will grant oral argument at its discretion. If the
5 Court grants oral argument, the Clerk must advise all parties and any amicus
6 curiae of the date, time, and place of the argument, and how much time will
7 be given for argument. Any motion to postpone the argument must be filed
8 reasonably in advance of the hearing date.

9 **(b) Order and Contents of Argument.** The appellant opens and concludes the
10 argument. Counsel must not read at length from briefs, records, or
11 authorities.

12 **(c) Attendance at Argument.** To be present at oral argument, a person must be
13 eligible under Rule 3 for access to classified national security information
14 that may be discussed. Ordinarily, that will entail the appropriate level of
15 security clearance, a need to know the information, and entry into a non-
16 disclosure agreement, as provided for under applicable law.

1 **Rule 18. Entry of Judgment.**

2 (a) **Entry.** A judgment is entered when the Court's opinion is filed with the
3 Clerk.

4 (b) **Notice.** On the date when the judgment is entered, the Clerk must serve on
5 all parties and the amicus curiae—if appointed—notice that an opinion has
6 been filed. On receiving notice, parties and the amicus curiae may make
7 arrangements with the Clerk to receive a copy of the opinion, if they have
8 access to a facility where the opinion can be stored in compliance with
9 Executive Order 13526 and agency-implementing directives. If parties or
10 the amicus curiae do not have access to such a facility, they may make
11 arrangements with the Clerk to view the opinion in the Court's secure
12 facility.

13 (c) **Unclassified Summary.** The Court may draft an unclassified summary of
14 each decision, order, or opinion and make that available to the Attorney
15 General for consideration as part of the review required under 50 U.S.C.
16 § 1872.

1 **Title VI. Administrative Provisions.**
2

3 **Rule 19. Practice Before the Court.** An attorney who appears before the Court
4 must be a licensed attorney in good standing in any state of the United States or the
5 District of Columbia and a member, in good standing, of the bar of a United States
6 district or circuit court, except that an attorney who is employed by and represents
7 the United States or any of its agencies in a matter before the Court may appear
8 before the Court regardless of federal bar membership. All attorneys appearing
9 before the Court must have the appropriate security clearance.

1 **Rule 20. Release of Court Records.**

2 (a) **Publication of Opinions.** If a quorum of the FISCR judges agree, the Court
3 may *sua sponte* or on motion by a party publish an opinion. Before
4 publication, the Court may, as appropriate, direct the Executive Branch to
5 review the opinion and redact it as necessary to ensure that classified
6 information is appropriately protected under Executive Order 13526 (or its
7 successor).

8 (b) **Other Records.** Except when an opinion is published or provided to a party
9 upon issuance, the Clerk must not release it, or other related records, without
10 a Court order. Such records must be released in conformance with the
11 security measures referred to in Rule 3.

12 (c) **Provisions of Court Records to Congress.**

13 (1) **By the Government.** The government may provide copies of Court
14 orders, opinions, decisions, or other Court records, to Congress, under
15 50 U.S.C. §§ 1871(a)(5), 1871(c), or 1881f(b)(1)(D), or any other
16 statutory requirement, without prior motion to and order by the Court.
17 The government, however, must contemporaneously notify the Court
18 in writing whenever it provides copies of Court records to Congress
19 and must include in the notice a list of the documents provided.

20 (2) **By the Court.** The Court may provide copies of Court orders,
21 opinions, decisions, or other Court records to Congress. Such
22 disclosures will be made in conformance with the security measures
23 referred to in Rule 3.

1 **Rule 21. Effective Date.** These rules are effective six months after transmittal to
2 Congress under 50 U.S.C. § 1803(g) unless otherwise provided by law. The Court
3 may determine the extent to which the rules apply to proceedings pending prior to
4 their effective date.

PROPOSED